

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Sep 26, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LISA W.,

Plaintiff,

v.

KILOLO KIJAKAZI,  
ACTING COMMISSIONER OF  
SOCIAL SECURITY,<sup>1</sup>

Defendant.

No. 2:20-CV-00321-JAG

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 19, 23. Attorney Chad Hatfield represents Lisa W. (Plaintiff); Special Assistant United States Attorney Jacob Phillips represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 5. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

<sup>1</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to  
2 42 U.S.C. § 405(g).

### 3 **I. JURISDICTION**

4 Plaintiff filed an application for Disability Insurance Benefits on May 5,  
5 2017, alleging disability since April 3, 2017, due to severe asthma, COPD,  
6 fibromyalgia, arthritis, and anxiety. Tr. 56-57. The application was denied initially  
7 and upon reconsideration. Tr. 83-89, 91-97. Administrative Law Judge (ALJ)  
8 Timothy Mangrum held a hearing on June 24, 2019, Tr. 27-54, and issued an  
9 unfavorable decision on September 5, 2019. Tr. 15-22. Plaintiff requested review  
10 of the ALJ's decision by the Appeals Council and the Appeals Council denied the  
11 request for review on July 14, 2020. Tr. 1-5. The ALJ's September 2019 decision  
12 is the final decision of the Commissioner, which is appealable to the district court  
13 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on  
14 September 9, 2020. ECF No. 1.

### 15 **II. STATEMENT OF FACTS**

16 The facts of the case are set forth in detail in the transcript of proceedings  
17 and are only briefly summarized here. Plaintiff was born in 1967 and was 49 years  
18 old as of her alleged onset date. Tr. 20. She has a GED and has worked in food  
19 service, retail, and maintenance positions. Tr. 220, 456. She last worked in April  
20 2017 as a kitchen helper and left due to severe asthma attacks and difficulty  
21 gripping things with her hands. Tr. 33, 456. She has had several emergency room  
22 visits for asthma attacks and testified that she has had difficulty obtaining more  
23 treatment for her conditions due to insurance and finances. Tr. 42, 326, 355, 387-  
24 88, 518, 527.

### 25 **III. STANDARD OF REVIEW**

26 The ALJ is responsible for determining credibility, resolving conflicts in  
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
28 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with

1 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
 2 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
 3 only if it is not supported by substantial evidence or if it is based on legal error.  
 4 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
 5 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
 6 1098. Put another way, substantial evidence is such relevant evidence as a  
 7 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
 8 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
 9 rational interpretation, the Court may not substitute its judgment for that of the  
 10 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
 11 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
 12 administrative findings, or if conflicting evidence supports a finding of either  
 13 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
 14 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
 15 supported by substantial evidence will be set aside if the proper legal standards  
 16 were not applied in weighing the evidence and making the decision. *Browner v.*  
 17 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

#### 18 **IV. SEQUENTIAL EVALUATION PROCESS**

19 The Commissioner has established a five-step sequential evaluation process  
 20 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v.*  
 21 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant  
 22 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d  
 23 at 1098-1099. This burden is met once a claimant establishes that a physical or  
 24 mental impairment prevents the claimant from engaging in past relevant work. 20  
 25 C.F.R. § 404.1520(a)(4). If a claimant cannot perform past relevant work, the ALJ  
 26 proceeds to step five, and the burden shifts to the Commissioner to show (1) the  
 27 claimant can make an adjustment to other work; and (2) the claimant can perform  
 28 specific jobs that exist in the national economy. *Batson v. Commissioner of Social*

1 *Sec. Admin.*, 359 F.3d 1190, 1193-1194 (10th Cir. 2004). If a claimant cannot make  
2 an adjustment to other work in the national economy, the claimant will be found  
3 disabled. 20 C.F.R. § 404.1520(a)(4)(v).

#### 4 V. ADMINISTRATIVE FINDINGS

5 On September 5, 2019, the ALJ issued a decision finding Plaintiff was not  
6 disabled as defined in the Social Security Act. Tr. 15-22.

7 At **step one**, the ALJ found Plaintiff had not engaged in substantial gainful  
8 activity since the alleged onset date. Tr. 17.

9 At **step two**, the ALJ determined Plaintiff had the following severe  
10 impairments: fibromyalgia and asthma. *Id.*

11 At **step three**, the ALJ found Plaintiff did not have an impairment or  
12 combination of impairments that met or medically equaled the severity of one of  
13 the listed impairments. Tr. 18.

14 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
15 she could perform a range of light work, with the following limitations:

16 [She] can frequently climb stairs, stoop, kneel, and crouch,  
17 occasionally crawl, and do no climbing of ladders, ropes, or  
18 scaffolds. [She] should avoid concentrated exposure to hazards,  
19 humidity/wetness, and vibration, and should avoid even  
20 moderate exposure to pulmonary irritants such as fumes, odors,  
21 dust, and gases.

22 Tr. 18.

23 At **step four**, the ALJ found Plaintiff was unable to perform her past  
24 relevant work as a janitor or cook helper. Tr. 20.

25 At **step five** the ALJ found that, considering Plaintiff's age, education, work  
26 experience and residual functional capacity, Plaintiff could perform jobs that  
27 existed in significant numbers in the national economy, specifically identifying the  
28

1 representative occupations of cashier II, bakery worker conveyor line, and office  
2 helper. Tr. 21.

3 The ALJ thus concluded Plaintiff was not under a disability within the  
4 meaning of the Social Security Act at any time from the alleged onset date through  
5 the date of the decision. Tr. 22.

## 6 VI. ISSUES

7 The question presented is whether substantial evidence supports the ALJ's  
8 decision denying benefits and, if so, whether that decision is based on proper legal  
9 standards.

10 Plaintiff contends the Commissioner erred by: (1) improperly evaluating the  
11 opinion evidence; (2) failing to conduct an adequate step three analysis; (3)  
12 improperly rejecting Plaintiff's subjective complaints; and (4) making inadequate  
13 step five findings.

## 14 VII. DISCUSSION

### 15 A. Plaintiff's Subjective Allegations.

16 Plaintiff contends the ALJ erred by improperly rejecting her subjective  
17 complaints. ECF No. 19 at 17-20.

18 It is the province of the ALJ to assess the claimant's allegations. *Andrews v.*  
19 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be  
20 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
21 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying  
22 medical impairment, the ALJ may not discredit testimony as to the severity of an  
23 impairment merely because it is unsupported by medical evidence. *Reddick v.*  
24 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of  
25 malingering, the ALJ's reasons for rejecting the claimant's testimony must be  
26 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.  
27 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are  
28 insufficient: rather the ALJ must identify what testimony is not credible and what

evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

The ALJ concluded Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, Plaintiff's statements concerning the intensity, persistence and limiting effects of those symptoms were not entirely consistent with the medical evidence and other evidence in the record. Tr. 19. The ALJ found Plaintiff's allegations were inconsistent with her reported activities and were not supported by the treatment notes. *Id.*

Plaintiff argues the ALJ overstated Plaintiff's activities and failed to identify any actual inconsistencies with her allegations. ECF No. 19 at 18-19. She further asserts the ALJ disregarded the variable nature of fibromyalgia, and argues that her extended hospitalizations and near-death from asthma exacerbations support her disabling testimony. *Id.* at 19. Defendant argues the ALJ reasonably found the minimal treatment records contradicted Plaintiff's extreme reports and that the documented activities contradicted Plaintiff's allegations. ECF No. 23 at 3-5. Defendant further notes the ALJ's finding that Plaintiff's asthma improved with treatment and disputes Plaintiff's assertion of frequent extended hospitalizations. *Id.* at 6-7.

The Court finds the ALJ's rationale is not supported by substantial evidence. The ALJ found Plaintiff's allegations were inconsistent with her ability to care for her husband and pets, perform personal care, prepare meals, do housework, and shop in stores. Tr. 19. The ALJ found these demonstrated activities to be inconsistent with her testimony that she could only stand for 15-20 minutes at a time and had trouble lifting or being in any position for an extended period of time. *Id.* A claimant's activities may support an adverse credibility finding if the activities contradict their other testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). However, the Court finds the ALJ did not identify any activities that

1 were inconsistent with Plaintiff's reports. The record contains minimal evidence of  
2 Plaintiff engaging in any of these activities, and her testimony and that of her  
3 husband indicated that she only engaged in activities sporadically, with assistance,  
4 and while taking breaks, in addition to her abilities varying from day to day  
5 depending on her energy and pain levels. Tr. 36-42, 212-19, 228-35, 472, 597.  
6 Nothing about this evidence indicates any inconsistency with Plaintiff's claimed  
7 symptoms and limitations.

8 The only other rationale offered by the ALJ for discounting Plaintiff's  
9 subjective reports was the lack of support from the treatment records. Tr. 22-24.  
10 This alone is an insufficient reason to reject her statements. *Reddick v. Chater*, 157  
11 F.3d 715, 722 (9th Cir. 1998). Because none of the ALJ's other reasons for  
12 questioning Plaintiff's allegations meet the clear and convincing standard,  
13 unsupportive objective evidence is not a sufficient rationale. Furthermore, the  
14 Court takes note that fibromyalgia is not a condition that generally presents with  
15 extensive objective findings. *See generally*, Social Security Ruling 12-2p; *Revels v.*  
16 *Berryhill*, 874 F.3d 648, 656-57 (9th Cir. 2017). It is not clear that the normal or  
17 unremarkable exam findings identified by the ALJ, such as intact strength and gait,  
18 have any bearing on the existence or severity of Plaintiff's conditions, and the ALJ  
19 cited to no medical source that indicated as much.

20 On remand, the ALJ shall re-evaluate Plaintiff's statements and testimony  
21 and make specific references to the record in support of any conclusions drawn  
22 regarding Plaintiff's subjective complaints.

23 **B. Ms. Lannie Coronado, PA-C.**

24 Plaintiff argues the ALJ improperly rejected the medical source statement  
25 from her treating provider, Ms. Coronado. ECF No. 19 at 10-14.

26 For claims filed on or after March 27, 2017, new regulations apply that  
27 change the framework for how an ALJ must weigh medical opinion evidence.  
28 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL



1 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 404.1520c. The new  
2 regulations provide the ALJ will no longer give any specific evidentiary weight to  
3 medical opinions or prior administrative medical findings, including those from  
4 treating medical sources. 20 C.F.R. § 404.1520c(a). Instead, the ALJ will consider  
5 the persuasiveness of each medical opinion and prior administrative medical  
6 finding, regardless of whether the medical source is an Acceptable Medical Source.  
7 20 C.F.R. § 404.1520c(c). The ALJ is required to consider multiple factors,  
8 including supportability, consistency, the source's relationship with the claimant,  
9 any specialization of the source, and other factors (such as the source's familiarity  
10 with other evidence in the file or an understanding of Social Security's disability  
11 program). *Id.* The regulations make clear that the supportability and consistency of  
12 the opinion are the most important factors, and the ALJ must articulate how they  
13 considered those factors in determining the persuasiveness of each medical opinion  
14 or prior administrative medical finding. 20 C.F.R. § 404.1520c(b). The ALJ may  
15 explain how they considered the other factors, but is not required to do so, except  
16 in cases where two or more opinions are equally well-supported and consistent  
17 with the record. *Id.*

18 Supportability and consistency are further explained in the regulations:

19  
20 (1) *Supportability*. The more relevant the objective medical  
21 evidence and supporting explanations presented by a medical  
22 source are to support his or her medical opinion(s) or prior  
23 administrative medical finding(s), the more persuasive the  
24 medical opinions or prior administrative medical finding(s) will  
25 be.

26  
27 (2) *Consistency*. The more consistent a medical opinion(s) or  
28 prior administrative medical finding(s) is with the evidence from  
other medical sources and nonmedical sources in the claim, the  
more persuasive the medical opinion(s) or prior administrative  
medical finding(s) will be.



1 20 C.F.R. § 404.1520c(c). The Ninth Circuit has additionally held that the new  
2 regulatory framework displaces the longstanding case law requiring an ALJ to  
3 provide “specific and legitimate” or “clear and convincing” reasons for rejecting a  
4 treating or examining doctor’s opinion. *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir.  
5 2022).

6 Plaintiff’s treating provider, Ms. Coronado, completed a medical source  
7 statement in support of her claim on December 13, 2018. Tr. 590-92. She noted  
8 Plaintiff’s diagnoses included chronic pain, asthma, anxiety, and depression, with  
9 symptoms and signs of chronic widespread muscle and joint pain, chronic fatigue,  
10 moderately persistent asthma with many triggers, and anxiety and depression.  
11 Tr. 590. She stated Plaintiff needed to lie down for 1-2 hours per day due to  
12 chronic fatigue and exhaustion, and that full-time work would likely exacerbate her  
13 conditions and cause her to miss four or more days of work per month due to flares  
14 of mental health issues and pain keeping her in bed, in addition to asthma attacks  
15 being triggered by environmental allergens and requiring days to recover.  
16 Tr. 590-91. She stated Plaintiff was limited to performing sedentary work, had  
17 limitations on handling and reaching, and would likely be off-task over 30% of the  
18 workday. Tr. 591-92.

19 The ALJ found this opinion was not persuasive, as it was not consistent with  
20 the largely unremarkable treatment notes and was not supported by the findings on  
21 the consultative exam or by other opinion evidence. Tr. 20.

22 Though the Court finds no error in the ALJ’s findings, since this claim is  
23 being remanded for reconsideration of Plaintiff’s subjective complaints, the ALJ  
24 shall also reconsider the medical opinion evidence, along with any additional  
25 evidence and testimony that may be submitted.  
26  
27  
28

1 **C. Step Three.**

2 Plaintiff argues the ALJ erred at step three by failing to discuss why  
3 Plaintiff's conditions did not equal the requirements of Listing 14.09D. ECF No.  
4 19 at 15-17.

5 At step three of the sequential evaluation process, the ALJ considers whether  
6 one or more of the claimant's impairments meets or equals an impairment listed in  
7 Appendix 1 to Subpart P of the regulations. 20 C.F.R. § 404.1520(a)(4)(iii). Each  
8 Listing sets forth the "symptoms, signs, and laboratory findings" which must be  
9 established for a claimant's impairment to meet the Listing. *Tackett v. Apfel*, 180  
10 F.3d 1094, 1099 (9th Cir. 1999). If a condition meets or equals a Listing, the  
11 claimant is considered disabled without further inquiry. 20 C.F.R. § 404.1520(d).

12 Plaintiff argues the ALJ erred at step three by failing to assess whether her  
13 fibromyalgia equaled the requirements of Listing 14.09D for inflammatory  
14 arthritis. She asserts when fibromyalgia is considered along with her other  
15 conditions, her constitutional signs of fever, fatigue, and malaise result in marked  
16 limitations in completing her activities of daily living. ECF No. 19 at 15-17.  
17 Defendant argues Plaintiff has not met her burden of demonstrating medical  
18 equivalence, and asserts that the record is starkly at odds with her claims that she is  
19 markedly limited in performing her daily activities. ECF No. 23 at 15-19.

20 The Court finds Plaintiff has not met her burden of demonstrating via  
21 medical evidence that the listing is met or equaled. However, as this claim is being  
22 remanded for further proceedings, the ALJ will make findings on each of the steps  
23 of the sequential evaluation process.

24 **VIII. CONCLUSION**

25 Plaintiff argues the decision should be reversed and remanded for the  
26 payment of benefits. The Court has the discretion to remand the case for additional  
27 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292  
28 (9th Cir. 1996). The Court may award benefits if the record is fully developed and

1 further administrative proceedings would serve no useful purpose. *Id.* Remand is  
2 appropriate when additional administrative proceedings could remedy defects.  
3 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court  
4 finds that further development is necessary for a proper determination to be made.

5 The ALJ's decision with respect to Plaintiff's subjective complaints is not  
6 supported by substantial evidence. On remand, the ALJ shall reevaluate Plaintiff's  
7 subjective complaints and the record as a whole and complete the five-step  
8 process. The Court makes no judgment as to the whether the record supports an  
9 award of benefits.

10 Accordingly, **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is  
12 **GRANTED IN PART.**

13 2. Defendant's Motion for Summary Judgment, **ECF No. 23**, is  
14 **DENIED.**

15 3. The matter is **REMANDED** to the Commissioner for additional  
16 proceedings consistent with this Order.

17 4. An application for attorney fees may be filed by separate motion.

18 The District Court Executive is directed to file this Order and provide a copy  
19 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and  
20 the file shall be **CLOSED.**

21 DATED September 26, 2022.



  
JAMES A. GOEKE  
UNITED STATES MAGISTRATE JUDGE